Supreme Court, U.S.
FILED
MAR 25 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1212

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

JEROME GREENE, NORMAN PECK AND PETER SHARP,
Appellants,

-against-

MANUEL MIRABEL, DEPUTY COMMISSIONER,
NEW YORK STATE DIVISION OF HOUSING
AND COMMUNITY RENEWAL,
Appellee,

VICTOR BONOMO, CHARLES HERMAN,
JOHN D. GREEN, LAZAR AND LEA GOTTFRIED,
BERNARD GOLDEN, RAY BERMAN, HOWARD SHAVEL,
JAMES L. MARCUS, HYMAN SUTTON, MICHAEL FREEDMAN,
LESTER LOCKWOOD, PAUL WEISSMAN AND SONIA REESE,
Appellees.

ON APPEAL FROM THE SUPREME COURT, STATE OF NEW YORK,
APPELLATE DIVISION, FIRST DEPARTMENT

BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

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BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

Preliminary Statement

Appellee's motion to dismiss or affirm misses the whole point of this appeal.

This case has never involved a challenge to the facial validity of rent control in New York. On the contrary, it is a challenge to a particular application of that rent control system to appellants' property in a manner which demonstrates -- beyond factual dispute -- that appellants are being deprived of the opportunity to earn a reasonable return on the capital value of their apartments.

The plain facts are these: under the pertinent New York statutes and regulations, the DHCR has determined the size of the increases in the maximum collectible rent required to allow appellants to earn 8-1/2% on capital value. The DHCR has gone further and ordered that appellants should get those increases.

But, then, instead of ordering those increases to go into effect immediately, the DHCR has limited yearly increases of rent to 7-1/2% per annum.

The net economic effect of this methodology, as we demonstrated in our Jurisdictional Statement, is to make it certain that appellants will not earn their statutory return of 8-1/2%, or even a fair return, or for that matter any return, until many years into the future, if at all.

The issue which this Court should hear and decide is whether that methodology -- applied in obedience to the New York rent control statutes -- is constitutionally valid.

The Pennell Decision

This Court's recent decision in *Pennell v. City of San Jose*, 56 U.S.L.W. 4168 (U.S. Feb. 24, 1988), does not mandate the granting of appellee's motion.

The ordinance at issue in *Pennell* established seven factors that the local administrator could consider in determining allowable rent increases. Appellants objected, on constitutional grounds, to the seventh factor which permitted consideration of the "hardship" of increases on low income tenants. As this Court noted (56 U.S.L.W. at 4170):

> In short, appellants contend, the additional reduction of rent on grounds of hardship accomplishes a transfer of the landlord's property to individual hardship tenants; the Ordinance forces private individuals to shoulder the "public" burden of subsidizing their poor tenants' housing. As appellants' point out, "[i]t is axiomatic that the Fifth Amendment's just compensation provision is 'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. ___, ___ (1987) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

The Court, however, declined to consider that contention "on the present record." The Court wrote (56 U.S.L.W. at 4170):

> As things stand, there simply is no evidence that the "tenant hardship clause" has in fact ever been relied upon by a Hearing Officer to reduce a rent below the figure it would have been set at on the basis of the other factors set forth in the Ordinance. In addition, there is nothing in the Ordinance requiring that a Hearing Officer in fact reduce a proposed rent increase on grounds of tenant hardship. Section 5703.29 does make it mandatory that hardship be considered -- it states that "the Hearing Officer shall consider the economic hardship imposed on the present tenant" -- but it then goes on to state that if "the proposed increase constitutes an unreasonably severe financial or economic hardship . . . he may order that the excess of the increase" be disal-

> lowed. § 5703.29 (emphasis added). Given the "essentially ad hoc, factual inquir[y]" involved in the takings analysis, *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979), we have found it particularly important in takings cases to adhere to our admonition that "the constitutionality of statutes ought not be decided except in an actual factual setting that makes such a decision necessary." *Hodel v. Virginia Surface Mining & Reclamation Ass., Inc.*, 452 U.S. 264, 294-95 (1981).

Here, by way of contrast, there is plenty of evidence and a precise, undisputed factual showing of the financial impact on appellants of New York's limitation of annual rent increases to 7-1/2%. 1/ We demonstrated that the 7-1/2% limitation has left appellants with virtually no return on the capital value of their apartments for an indefinite future.

Moreover, in further contrast to *Pennell*, appellants are saddled with these "returns" even though they have exhausted all their administrative remedies -- and even though the administrator of the New York system has explicitly found that much larger rent increases are needed if appellants are to be able to earn their statutory return.

In short, there could not be a clearer case of a "transfer of the landlord's property" to his tenants.

1/ In our Jurisdictional Statement, we identified Title 9, § 2201.6 of the *Official Compilation of Codes, Rules and Regulations of the State of New York* (9 NYCRR § 2201.6) as the source of the 7-1/2% limitation on rent increases under rent control. This regulation merely duplicates a statute of the City of New York, codified at § 26-405(a)(5) in the *Administrative Code of the City of New York* (Local Laws of the City of New York). (Continued)

As an example, the DHCR (the appellee) held that appellants, for Apartment 6A at 44 Grammercy Park North 2/, were entitled to a "hardship rent" of $819.76 (Record on Appeal ("RA") at 179). However, as a result of the 7-1/2% limitation, the DHCR actually allowed appellants the following rent increases (RA at 179):

Amount of Increase	Rent After Increase	Effective Date of Increase
44.46 3/	552.38	4/3/83
41.43	593.81	4/3/84
44.54	638.35	4/3/85
47.88	686.23	4/3/86
51.47	757.70	4/3/87
55.33	793.03	4/3/88
26.73	819.76	4/3/89

(Continued) The hardship provision, that gives landlords the opportunity to earn an 8-1/2% return on the capital value of their apartments, is also a statute of the City of New York in addition to being set out as a regulation at 9 NYCRR § 2202.8. It was enacted pursuant to Local Law 1970, No. 30 and then temporarily repealed pursuant to Local Law 1972, No. 24, effective January 1, 1974. That repeal was declared void by the New York Court of Appeals in *210 East 68th Street Corp. v. City Rent Agency*, 34 N.Y.2d 560, 345 N.Y.S.2d 941, 310 N.E.2d 538 (1974). Thus, the 8-1/2% hardship law, Local Law 1970, No. 30, continues to be in effect, although it does not appear in McKinney's statutory compilation of the laws of New York.

2/ The chart appearing in the Jurisdiction Statement (pp. 9-9a) sets forth financial data, similar to that appearing here for Apartment 6A Grammercy Park North, for Apartment 6A 444 East 52nd Street.

3/ The Rent Law and Regulations, 9 NYCRR § 2202.3d(2), provides that the 7-1/2 percent limitation may be waived by the Administrator where a greater increase is necessary to make the earned income from the property equal to its operating expenses. As of December 1982, the rent for apartment 6A was $525.60 per month. Based on a complete audit of appellants' books, the DHCR determined that the actual operating expenses during 1981 (one year prior to the hardship application) were $570.06 per month -- hence, a cash flow loss per month of $44.46.

Thus, appellants, based on 1981 expenses, were relegated to a return on capital value of 0% during 1983 (when the rent was brought up to a break even level), a return of 1.32% during 1984, a return of 2.73% in 1985, a return of 4.26% in 1986, a return of 5.89% in 1987, a return of 7.65% in 1988 and a return of 8.5% in 1989 (RA at 179). But even those "returns" were based on the absurd assumption that there would be no increase in operating expenses from 1981 to 1989.

In fact, the record below established that appellants' expenses had actually increased in 1982 and 1983 by an amount which exceeded the 7-1/2% rent increases. Thus, as to apartment 6A, appellants, rather than receiving a 0% return in 1983, were actually faced with a loss in excess of $1,000 based upon actual cash flow (RA 305). (For purposes of these calculations, appellants excluded debt service and presumed that their property was owned free and clear (RA 323-331.))

The record below further established that, even assuming a modest rate of inflation for operating expenses, appellants would continue to sustain an operating loss each and every year through 1989 (RA 305).

This same showing could be made for the other apartments involved on this appeal (RA 302-318, 334-344). We have no doubt it could also be made for other owners of rent controlled property in New York City. In the face of historic increases in operating expenses (including real estate taxes) and historic rates of inflation, the 7-1/2% limitation places every rent-controlled landlord under a system which insures that he will be receiving unreasonably low returns. *Compare Bowles v. Willingham*, 321 U.S. 503 (1944) (during World War II, particular landlord that suffers unreasonably low return for short period has not suffered a taking).

The undeniable -- and undenied -- proposition demonstrated by the record below is that New York's irrebuttable presumption that tenants cannot pay more than a 7-1/2% increase in rent per annum for rent controlled properties condemns these appellants, for all practical purposes, to a 0% return on the value of their property.

Our position should not be misunderstood. The statutory return in New York has been determined by the legislature to be 8-1/2% on capital value. We do not assert that we are constitutionally entitled to that return. But we do submit that, as a constitutional matter, the rent regulation system must allow landlords a return which is "reasonable." The New York rent control system, as the record below amply demonstrates, fails to do that -- not unless returns of 0%, or perhaps 1% or 2%, are to be deemed reasonable.

In these circumstances, the application of New York's statutory limitation of annual rent increases to 7-1/2% -- a limitation which applies across-the-board without regard to individual tenant "hardship" -- has clearly violated appellants' constitutional rights.

* * *

In *Pennell*, this Court recognized that a rent control scheme must (56 U.S.L.W. at 4717):

> represent[] a rational attempt to accommodate the conflicting interests of protecting tenants from burdensome rent increases while at the same time insuring that landlords are guaranteed a fair return on their investment.

The New York scheme, we submit, is clearly not such a "rational attempt." [4/]

[4/] It is undisputed that appellants' constitutional claims were squarely presented to the New York courts at every stage of the proceedings below.

Appellee's Cases

Rather than deal with the real issues on this appeal, appellee's brief reads as if it were a response to a to *per se* challenge to the constitutionality of rent control.

In consequence, the cases cited by appellee are not in point:

In *Kaplan v. Prince*, 444 U.S. 938 (1979), the landlord failed in a challenge to New York's rent control scheme on the ground that there was no longer a housing shortage.

In *Eisen v. Eastman*, 421 F.2d 560 (2d Cir. 1969), *cert. denied*, 400 U.S. 841 (1970), the landlord's constitutional challenges were rejected because of his failure to exhaust his administrative remedies.

In *Israel v. City Rent and Rehabilitation Administration*, 285 F. Supp. 908 (S.D.N.Y. 1968), the landlord's "vague and conclusory allegations" were insufficient to overcome the facial constitutionality of rent control.

In *Davenport v. Berman*, 420 F.2d 294 (2d Cir. 1969), the landlord's challenge to rent control was dismissed on jurisdictional grounds.

In *Benson Realty Corp. v. Beame*, 50 N.Y.2d 994, 431 N.Y.S.2d 475, 409 N.E.2d 948 (1980), *app. dismissed*, 449 U.S. 1119 (1981), plaintiffs' "as applied" challenge contained only generalized conclusions, which the Court thought might be persuasive in the forum of public opinion, but did not establish a taking.

In *Hartley Holding Corp. v. Gabel*, 13 N.Y.2d 306, 247 N.Y.S.2d 97, 196 N.E.2d 537 (1963), a rent control provision using equalized assessed value rather than non-equalized assessed value for purposes of computing rent increases was held to be facially constitutional.

In *Oriental Boulevard Co. v. Heller*, 27 N.Y.2d 212, 316 N.Y.S.2d 226, 265 N.E.2d 72 (1970), *app. dismissed*, 401 U.S. 986 (1971), the Court held that New York City could constitutionally regulate the use of fuel burners and refuse incinerators to control the emission of aerial pollutants.

What do any of these cases have to do with the issues on this appeal? Nothing, we submit.

Appellants here are not claiming that their property has been subjected to a "taking" merely because its value is substantially decreased by the existence of a regulated rent. Rather, on a full record "in an actual factual setting which makes a decision necessary," *Hodel v. Virginia Surface Mining and Reclamation Assn., Inc.*, 452 U.S. 264, 294–295 (1981), appellants assert that New York Law, as applied herein, and after exhaustion of all administrative remedies, condemns them to a return on the capital value of their property so low as to be unconstitutional.

CONCLUSION

For the reasons stated above and in the Jurisdictional Statement, this Court should note probable jurisdiction. Alternatively, appellants respectfully request that the Jurisdictional Statement be treated as a petition for writ of certiorari, and granted. 28 U.S.C. § 2103.

New York, New York
April 1, 1988

Respectfully submitted,

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